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HONG LEE PENG & ORS v. HONG SHAW LIN & ORS

HIGH COURT MALAYA, SHAH ALAM
ALICE LOKE YEE CHING JC
[SUIT NO: BA-22NCVC-489-11-2019]
19 SEPTEMBER 2022

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Abstract – *(i) In construing a will, the intention of the testator is paramount and must be given effect to. The intention is to be derived from the wordings of the will. The duty of the court is to give effect to the wishes of the testator; and (ii) a no-contest clause in a will is only effective if the testator demonstrates it by the inclusion of a gift over that he is indeed in earnest.*

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SUCCESSION: *Will – Trustee – Breach of duty – Removal of trustee – Allegation that trustee acted in breach of instructions under will – Whether trustee given absolute discretion to administer estate of deceased under will – Whether intended by deceased – Whether there was reason to interfere with wishes of deceased – Whether there was sufficient cause to remove trustee – Probate and Administration Act 1959, s. 34*

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SUCCESSION: *Will – Clause – No-contest clause – Will contained no-contest clause – Whether testator intended to impose clause – Whether there was gift over – Whether no-contest clause enforceable*

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The plaintiffs' suit concerned the administration of the estate of the deceased. The first defendant was appointed the executor and trustee of the deceased's estate pursuant to a will. It was the plaintiffs' contention that the first defendant had breached his duties as an executor and trustee. The second defendant was a locally incorporated company where the deceased was a director and substantial shareholder. The third, fourth and fifth defendants were the children of the first defendant. The first defendant had applied and obtained grant of probate in the High Court. According to the plaintiffs, the first defendant (i) acted in conflict of interest and improbity by regarding himself as the sole beneficiary of the deceased's estate. His application for grant of probate described himself as the sole beneficiary; (ii) failed to ascertain and bring in the deceased's assets and liabilities. An amount of RM400,000 allegedly owing by the deceased to one Kok Toon; (iii) failed to sell the immovable and movable properties in the deceased's estate and to distribute fairly amongst members of the family. To date, only cash amounts had been distributed; (iv) wrongfully distributed the deceased's estate, in breach of the instructions under the will. The deceased's property was to be distributed only to family members. However, the first defendant transferred the deceased's share in a house which was jointly owned with one Madam Chan whom the plaintiffs did not recognise as the lawful wife of the

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deceased; (v) wrongfully transferred 874,000 shares of the deceased in the second defendant to himself and his three children, the third to fifth defendants, prior to fully ascertaining the deceased's liabilities and debts. In addition, wrongfully mixed his personal funds with the trust funds; and (vi) refused to give an account to the plaintiffs when requested to do so. Therefore, the plaintiffs sought, *inter alia*, (i) the first defendant's removal under s. 34 of the Probate and Administration Act 1959; (ii) to replace the first defendant with the first plaintiff as the sole executor and trustee of the deceased's estate; (iii) the first defendant to give a full account of the administration of the estate of the deceased; (iv) to set aside the transfer of the shares in the second defendant to the first, third, fourth and fifth defendants and for the defendants to disgorge and return all immovable and movable assets of the deceased that had been disposed of by the first defendant as the executor and trustee. The first defendant's position was that (i) as the sole executor, he was given the absolute discretion to administer the estate of the deceased including the distribution of the assets of the estate; (ii) his discretion encompassed not only the power to call in, sell but also to postpone the sale of the assets of the estate; and (iii) the exercise of his discretion could not be questioned by any of the beneficiaries. The defendants counterclaimed against the plaintiffs and contended that: (i) the plaintiffs' suit was not a claim genuinely premised on the first defendant's failure to execute his duties. Instead, it was only disguised as such to demand for more distribution of the estate's property; (ii) the will had a no-contest clause prohibiting any challenge to the first defendant's exercise of discretion in administering the deceased's estate and/or the commencement of any legal proceedings to demand for a greater share in the estate. The consequences of any such action shall entitle the beneficiary taking such action to only RM1; and (iii) the defendants therefore sought to enforce the no-contest clause in the counterclaim against the plaintiffs. The plaintiffs were to return all that they had received from the deceased's estate in various amounts less RM1.

Held (dismissing plaintiffs' claim and defendant's counterclaim):

(1) The description of the first defendant as the sole beneficiary in the application for grant of probate was immaterial and irrelevant. It was merely a matter of form. What was more relevant was his general conduct in relation to the distribution of the deceased's estate. The evidence on the shares transferred to himself and his sons could not be looked at in isolation. The estates were not distributed solely to himself or his children. He also distributed to other beneficiaries. The evidence showed the first defendant's conduct to be contrary to the allegation that he regarded himself as the sole beneficiary. His conduct was certainly not that of someone who regarded himself as the sole beneficiary. Although the will stipulated that he was to distribute RM1,000 to each member of the family, he distributed more than that. (paras 36, 39 & 42)

(2) The allegation that an amount of RM400,000 was owed by the deceased from the sale of Kok Toon's shares was implausible. Apart from the oral assertion of the plaintiffs, there was no other evidence to substantiate the claim. In fact, the fourth plaintiff, who was the executor of Kok Toon's will, admitted that the RM400,000 owed by the deceased was not stated as part of the assets of the estate of Kok Toon. The failure of the first defendant to ascertain and bring in the assets of the deceased as well as to settle his liabilities had not been convincingly made out. (paras 52, 53 & 56)

(3) The terms of the will were material. Firstly, the terms expressly provided that the first defendant had the power 'to sell the same with power at his absolute discretion to postpone such sale upon trust …'. Secondly, the will also conferred on the first defendant absolute discretion in determining the distribution of the estate property to any beneficiary. That was obvious from the words '… to distribute to the family member as beneficiary at his absolute discretion …'. To further emphasise the full discretion of the executor and trustee, the testator added '… and nobody shall ever question his exercise of discretion whatsoever!'. The words employed in the will in the instant case were such that the court was left in no doubt that the deceased intended the first defendant to have absolute discretion in the administration of his estate. The plaintiffs had no right to demand for the assets to be sold and the proceeds to be distributed to them. The issue of the first defendant's failure to sell the properties and to distribute the proceeds did not arise. (paras 59, 63 & 64)

(4) The fact that the deceased had a relationship with Madam Chan and that Kok Foon and Kok Sung were their two sons was not disputed. It was also not disputed that both the deceased and Madam Chan jointly owned the said house. Madam Chan and her sons were clearly kith and kin and related to the deceased. The word family members should not be given a legalistic meaning to mean only legitimate family members. There was nothing in the will to indicate so. The issue of family members was independent of the validity of a marriage. For this reason, it was not necessary to decide if Madam Chan was the lawful wife. The plaintiffs' contention that the first defendant distributed the estate to Madam Chan and her sons in breach of the terms of the will, was without merit. (paras 78, 80-82)

(5) The first defendant did not deny that he transferred the deceased's shares in the second defendant to himself and to the third to fifth defendants some three months after the grant of probate. Bearing in mind the terms of the will, the deceased had intended that the first defendant have full control over the estate as he deemed fit. (paras 85 & 86)

(6) Mixing of funds did not necessarily constitute breach of trust. The first defendant used the funds in his personal account to make payment to the beneficiaries when he ought to have used the funds from the estate's account. Whilst the first defendant demonstrated some lack of diligence on his part and ought to have kept the accounts separate, it was at most a mistake on his part. The court would not hold him to the standard expected of a professional trustee. He merely showed less than prudent behaviour in mixing the funds. (para 88)

(7) The deceased had intended to leave the administration of the estate entirely to the first defendant as the eldest son of the family. Consequently, there was no reason to interfere with the wishes of the deceased as expressed in the will that the first defendant was to administer the estate according to his absolute discretion. The plaintiffs did not establish, on a balance of probabilities, sufficient cause to remove the first defendant and to grant the orders sought in these proceedings. (paras 94 & 95)

(8) The no-contest clause had been referred to as the *in terrorem* clause. The *in terrorem* rule provides that the testator had not really intended to impose the conditions and therefore, the no-contest condition would only be given if the testator demonstrated by the inclusion of a gift over that he was indeed in earnest. In the present case, apart from the threat that anyone challenging the exercise of the trustee's discretion or commences legal proceedings to demand more share shall be entitled to only RM1, the deceased failed to state what was to happen to the amount that had been distributed. In the absence of such express gift over, the no-contest clause was unenforceable. In the circumstances, the counterclaim of the defendants must necessarily fail. (paras 100, 104 & 105)

Case(s) referred to:

Chia Chiew Neo (Spinster) v. Tan Thian Chye & Anor; In the Matter Of The Will Of Chia Yew Siang (Also Known As Chia Bok Tong), Deceased [1932] 1 LNS 10 HC ***(refd)***

Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors [1998] 4 CLJ 81 CA ***(refd)***

Foo Jee Seng v. Foo Jhee Tuang [2012] SGCA 41 ***(refd)***

Leong & Anor v. Lim Beng Chye [1955] AC 648 ***(refd)***

Letchumanan Chettiar Alagapan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Ligar Fernandez v. Eric Claude Cooke [2002] 6 CLJ 152 HC ***(refd)***

Panchanath Ratnavale v. Sandra Segara Mahalingam & Ors [2012] 1 LNS 167 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102
Probate and Administration Act 1959, s. 34

For the plaintiffs - Andrew Chiew Ean Vooi & Nicola Tang Zhan Ying; M/s Lee Hishammudin Allen & Gledhill.
For the defendants - Yeoh Kong Hwa & Lee Fey Yee; M/s Azam-Malek & Soh

Reported by Lina E

JUDGMENT

Alice Loke Yee Ching JC:

Introduction

[1] The plaintiffs' suit concerns the administration of the estate of one Khee Heng @ Hong Kim Phoh, the deceased. The first defendant was appointed the executor and trustee of the deceased's estate pursuant to a will dated 5 February 2013 ("the will"). The plaintiffs claim that the first defendant had breached his duties as an executor and trustee and sought *inter alia*, for his removal and other consequential orders.

Factual Background

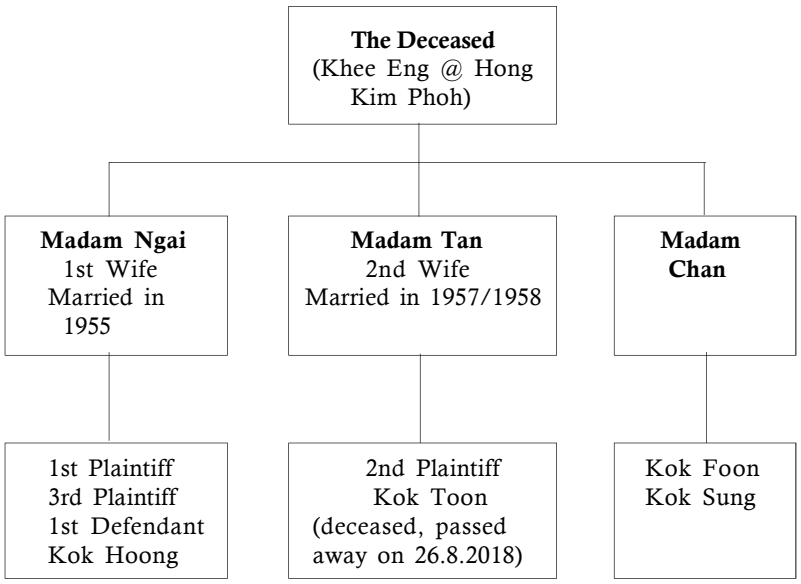
[2] The factual matrix upon which the suit is premised, is as follows. I shall start with the parties in this case.

[3] The deceased had several relationships in his lifetime. He first married Madam Ngai Yuen Lan sometime in 1955. She passed away in 2008. She bore him the first plaintiff, third plaintiff and the first defendant. Another son, Kok Hoong was also born to the deceased. He is not a party to these proceedings.

[4] The deceased then married Madam Tan Tian Gek sometime in or around 1957 or 1958. She survived the deceased and passed away only on 10 November 2020. The second plaintiff and Kok Toon are the issues from this marriage. Kok Toon passed away on 26 August 2018. The fourth plaintiff is his widow and the executrix of his estate.

[5] Subsequent to these two marriages, the deceased had a relationship with one Madam Chan Swee Yong ("Madam Chan"). The plaintiffs, however, do not acknowledge Madam Chan as the lawful wife of the deceased. Madam Chan had always been regarded as a mistress by them. There are two sons born from this relationship, namely, Kok Foon and Kok Sung.

[6] Below is a diagram illustrating the entire family members and their roles in the present proceedings:



[7] The second defendant is a locally incorporated company. The deceased was a director and substantial shareholder of the second defendant.

[8] The third, fourth and fifth defendants are the children of the first defendant.

[9] The deceased was an enterprising man. During his lifetime, he successfully built up his plywood lamination and furniture business through various companies. Some of his family members assisted him in his business.

[10] He passed away at the age of 87 on 26 December 2015. He died of cancer.

[11] The day following the funeral, on 31 December 2015, the first defendant requested the family members to attend a reading of the Will at the office of Messrs. Azam Malek & Soh, the present solicitors for the defendants. The first plaintiff, her husband, second plaintiff, third plaintiff, Kok Toon, fourth plaintiff, Kok Hoong, Madam Chan, Kok Foon, Kok Sung and the first defendant attended the will reading. The will reading was conducted mainly in Mandarin.

[12] The contents of the will were explained to those present. At the conclusion of the will reading, the first defendant stood up to declare that he would distribute the estate fairly.

[13] The will reads:

Last Will And Testament

1, KHEE ENG @ HONG KIM PHOH (NRIC NO: 281006-10-5131) of No. 2, Jalan 11, Kaw 17, Taman Eng Ann, 41150 Klang, Selangor Darul Ehsan, being of age and of sound mind, do hereby revoke all former wills and testamentary dispositions made by me and declare this to be my last will and testament.

1. I hereby appoint my eldest son, HONG SHAW LIN (NRIC No. 560218-10-6269) as the SOLE executor and trustee of this my Will.

2. I give and bequeath all my movable and immovable properties of whatsoever kind and wheresoever situate over which I have any power of testamentary disposition and not otherwise disposed of by this my will or any codicil hereto to my Trustees to sell the same with power at his absolute discretion to postpone such sale upon trust to pay my debts and my funeral and testamentary expenses and to stand possessed of the residue upon trust to distribute to the family member as beneficiary AT HIS ABSOLUTE DISCRETION and nobody shall ever question his exercise of discretion WHATSOEVER!

3. Subject to cash available, my Trustee shall distribute at least RM1,000 to each member of the family. Anyone who disputes my Trustee's discretion or commence legal action demanding for more share of my estate shall receive only RM1.00.

IN WITNESS THEREOF I have hereunto set my hand this 5 Feb 2013 in the year two thousand and thirteen.

Signed and declared as his last will by) KHEE ENG @ HONG KIM PHOH who appeared thoroughly) to understand the contents of this will) in the presence of us both at the same) time who at this request and) in his presence, and in the presence) of each other have subscribed our) names at witnesses) sgd. KHEE ENG @ HONG KIM PHOH

… sgd … Witness

… sgd … Witness

[14] It is to be noted that the will did not specify the list the assets of the deceased and the respective beneficiaries to whom the assets are to be distributed. It is unfortunate that the will has now given rise to the present dispute and the competing claims by the parties.

[15] On 22 February 2016, the first defendant applied for grant of probate in the Shah Alam High Court. The grant was issued on 8 March 2016. The list of assets annexed to the application showed that the deceased left behind fairly substantial assets. The assets comprise of movable assets made up of monies in numerous bank accounts, insurance policy, shares in the second defendant, whereas the immovable assets are a single storey factory in Klang, a double storey terrace house in Klang, and a half share of another double storey terrace house in Klang.

The Plaintiffs' Case

[16] The plaintiffs' claim is essentially one of breach of the first defendant's duties, both as an executor and a trustee of the will. I have summarised the instances of breach from the pleaded case of the plaintiffs, as follows:

(i) acted in conflict of interest and improbity by regarding himself as the sole beneficiary of the deceased's estate. His application for grant of probate described himself as the sole beneficiary;

(ii) failed to ascertain and bring in the deceased's assets and liabilities. Amongst the deceased's liabilities is the debt due to Kok Toon. The deceased had not fully paid Kok Toon for the sale of the latter's shares in Poly-ply Industries Sdn. Bhd. An amount of RM409,780 remains due and owing;

(iii) failed to sell the immovable and movable properties in the deceased's estate and to distribute fairly amongst members of the Hong family. To date, only cash amounts have been distributed as follows:

(a) first plaintiff -RM10,000;

(b) second plaintiff -RM30,000;

(c) third plaintiff -RM30,000;

(d) Kok Toon -RM60,000; and

(e) Kok Hoong -RM50,000.

(iv) wrongfully distributed the deceased's estate in breach of the instructions under the will. The deceased's property was to be distributed only to family members. However, the first defendant transferred the deceased's ½ share in the double storey house in Klang which was jointly owned with Madam Chan, whom the plaintiffs did not recognise as the lawful wife of the deceased;

(v) wrongfully transferred 874,000 shares of the deceased in the second defendant to himself and his three children, the third to fifth defendant on 25 June 2016, prior to fully ascertaining the deceased's liabilities and debts. In addition, wrongfully mixed his personal funds with the trust funds; and

(vi) refused to give an account to the plaintiffs' when requested to do so. The plaintiffs as beneficiaries are entitled to seek inspection and copies of trust accounts. Instead of complying with the request, the first defendant threatened to exercise the no-contest/forfeiture clause in the will.

[17] At the trial, further facts and evidence was adduced in addition to that pleaded in the plaintiffs' amended statement of claim in support of the alleged breach of the first defendant's duties.

[18] Premised on the above breaches, the plaintiffs claim that there is sufficient cause shown to remove the first defendant under s. 34 of the Probate and Administration Act 1959. The plaintiffs seek to replace the first defendant with the first plaintiff as the sole executor and trustee of the deceased's estate. In addition, the first defendant is to give a full account of the administration of the estate of the deceased. The plaintiffs also seek for this court to set aside the transfer of the shares in the second defendant to the first, third, fourth and fifth defendants and for the defendants to disgorge and return all immovable and movable assets of the deceased that have been disposed of by the first defendant as the executor and trustee.

The Defence Case

[19] The principal defendant in this case is the first defendant. No orders are sought against the second defendant. The third to fifth defendants are cited for the purpose of the ancillary orders sought.

[20] The first defendant's position is that as the sole executor, he is given the absolute discretion to administer the estate of the deceased, including the distribution of the assets of the estate. His discretion encompasses not only the power to call in, sell, but also to postpone the sale of the assets of the estate. The exercise of his discretion cannot be questioned by any of the beneficiaries.

The Counterclaim Of The Defendants

[21] The defendants contend that the present suit is not a claim genuinely premised on the first defendant's failure to execute his duties. Instead, it is only disguised as such to demand for more distribution of the estate property.

[22] The will has a no-contest clause prohibiting any challenge to the first defendant's exercise of discretion in administering the deceased's estate and/or the commencement of any legal proceedings to demand for a greater share in the estate. The consequences of any such action shall entitle the beneficiary taking such action to only RM1.

[23] The defendants therefore seek to enforce the no-contest clause in the counterclaim against the plaintiffs. The plaintiffs are to return all that they had received from the deceased's estate in various amounts less RM1.

Plaintiffs' Defence To The Counterclaim

[24] The plaintiffs contend that the non-contest clause is ineffective against them. The clause in question is not supported by a gift over as the clause did not stipulate what would happen to the forfeited sum already distributed to the plaintiffs less RM1.

Issues To Be Determined

[25] Broadly stated, the central issue is whether there is sufficient cause to remove the first defendant as the sole executor and trustee of the will. The determination of this issue would depend on whether the first defendant had breached his duties as an executor and trustee of the deceased's will. The determination of this issue would in turn depend on the construction of the terms of the will.

[26] The next question to be determined relates to the counterclaim. This court will have to determine whether the non-contest clause is valid and enforceable against the plaintiffs for having brought the present action.

The Trial

[27] Six witnesses testified for both parties. All the plaintiffs testified. The defence had two witnesses, including the first defendant. The trial spanned a total of nine days in all.

Analysis And Decision Of This Court

[28] It is trite law that the plaintiffs bear the onus of proving their claims. and the first defendant, his counterclaim. (See: ss. 101 and 102 of the Evidence Act 1950 and *Letchumanan Chettiar Alagappan (As Executor To SL Alamelooo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418).

Powers To Remove An Executor

[29] The starting point is to examine the powers of the court to remove an executor. Section 34 of the Probate and Administration Act 1959 (Act 97) confers upon the court such powers, from the wordings employed as follows:

> **Revocation of grant**
>
> 34. Any probate or letters of administration may be revoked for sufficient cause.

[30] The principles upon which the court will exercise its powers to do so was discussed in the Court of Appeal case of *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* [1998] 4 CLJ 81; [1998] 4 MLJ 268 which held:

It is pertinent at this stage to examine the law on the power of the court to revoke a grant of probate or letters of administration. Section 34 of the Act provides that:

> Any probate or letters of administration may be revoked or amended for any sufficient cause.

The power to revoke a grant of probate is vested in the High Court and may be exercised if the court is satisfied that there is sufficient cause to do so. In spite of this power it cannot be gainsaid that we are sensitive that the courts generally would be slow to interfere with the express wishes of a testator. Nevertheless s. 34 of the Act empowers the court to interfere if sufficient cause is shown. The crucial question is what amounts to sufficient cause. The phrase 'sufficient cause' has not been defined anywhere. In *Re Khoo Boo Gong (decd); Khoo Teng Seong v. Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68, the Federal Court had occasion to consider that same phrase and at p. 69 of the report the following was expressed:

> The power to revoke a grant of probate or letters of administration is vested in the High Court by s. 34 of the Probate and Administration Act 1959 and can be exercised for 'any sufficient cause'. However, there is no definition of what is sufficient cause.
>
> But, if in the words of Jeune, President, in *In the Goods of William Loveday* [1900] P 154: 'the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto,' then the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries. In our view, that is a strictly objective test. (See also *Fazil Rahman & Ors v. AR S Nachiappa Chettiar* [1963] MLJ 309 at p. 310; and *In the Goods of William Loveday* [1900] P 154). The same test was adopted by the High Court in *Tan Khay Seng v. Tan Kay Choon & Anor* [1990] 1 MLJ 51 at p. 54. In Australia and New Zealand, the test appears to be whether the executor is fit to act, but the line of cases shows that the court adopted the sufficient cause test (see *Hunter v. Hunter & Anor* [1937] NZLR 794 (SC) and *Shaw v. Thomas* [1954] NZLR 585 (SC)). From the line of cases, it can be seen that the courts have considered the welfare and interests of the beneficiaries of the estate as the paramount criteria in deciding whether or not there are any sufficient cause to interfere.

[31] Bearing in mind the principles enunciated, I shall now proceed to consider the allegations and the evidence adduced by the plaintiffs to establish that sufficient cause has been shown.

Acted In Conflict Of Interest And Improbity By Regarding Himself As The Sole Beneficiary

[32] The plaintiffs allege that the first defendant had falsely declared himself to be sole beneficiary under the will. They rely on the affidavit in

support of the application for grant of probate wherein the first defendant had stated on oath he was the sole beneficiary. In the list of beneficiaries annexed to the application, the first defendant was listed as the sole beneficiary.

[33] When he was cross-examined on the same by the plaintiffs' counsel, he replied in the affirmative. He asserted that according to the will, he was the only beneficiary.

[34] In support of this allegation made, the plaintiffs rely on his conduct which clearly showed that he regarded the deceased's estate as his. Before his pre-distribution duties as an executor was completed, he transferred the deceased's shares in the second defendant amounting to 874,000 shares to himself and his children, namely the third to fifth defendants.

[35] To my mind, the description of the first defendant as the sole beneficiary in the application for grant of probate is immaterial. It is merely a matter of form. What is more relevant is his general conduct in relation to the distribution of the deceased's estate.

[36] The evidence on the shares transfer to himself and his sons cannot to be looked at in isolation. The estate assets were not distributed solely to himself or his children. He also distributed to other beneficiaries.

[37] To each of the first, second, third plaintiffs, Kok Toon and Kok Hoong, he gave them cash of varying amounts. The first plaintiff was given only RM10,000 as he felt she was a woman of means. The others were given more. The second and third plaintiffs received RM30,000 each. Kok Toon was given RM60,000 to assist him financially for his cancer treatment. Over and above these sums, an amount of RM1,500 a month was paid to Kok Toon from December 2017 until his passing in August 2018. The first defendant also gave Kok Hoong RM45,000. Madam Chan and her two sons were also not left out. They received cash gifts of RM20,000 each. The cheque butts and vouchers pertaining to the cash distribution and labelled 'Being Gift of Father's Estate' were adduced in evidence.

[38] Madam Tan, the second wife of the deceased survived her husband. Although the will did not provide for her monthly subsistence, after the deceased death, the first defendant paid her RM1,600 every month from the monies in the estate. This was to honour the deceased's wishes that she be provided for. In September 2019, he even increased the allowance to RM2,000 from RM1,600 until she passed away in November 2020. The expenses for hiring a maid for Madam Tan costing RM19,000 was also borne by him.

[39] The evidence therefore shows the first defendant's conduct to be contrary to the allegation that he regarded himself as the sole beneficiary. His conduct was certainly not that of someone who regarded himself as the sole beneficiary. Although the will stipulated that he was to distribute RM1,000 to each member of the family, he distributed more than that.

[40] Apart from distributing the estate monies to the other beneficiaries, there was uncontroverted evidence that he used the estate funds for the funeral expenses of Kok Toon and Madam Tan upon their passing. As the eldest son, he also made the funeral arrangements for his father and the expenses were borne by him.

[41] In examination-in-chief, the first defendant stated that he will continue to make distribution as and when the need arises. He added that he understood the spirit and intention of the will as conferring on him an absolute discretion to distribute the deceased's estate. I will say more of the intention of the deceased as expressed in the will later.

[42] I therefore find the allegation that he regarded himself as the sole beneficiary has been refuted by the evidence adduced. His conduct prevails over his description of himself as sole beneficiary in the application of the grant of probate. In any event, how he described himself is, to me, irrelevant.

Failed To Ascertain And Bring In The Assets/Settle The Deceased's Liabilities And Debts

[43] The duties of an executor which encompasses not only ascertaining the assets and debts, but also settling the liabilities of the estate, are principles of settled law. (See: *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* (*supra*), *Ligar Fernandez v. Eric Claude Cooke* [2002] 6 CLJ 152; [2002] 5 MLJ 177).

[44] The plaintiffs' case was that these principles as enunciated were not adhered to by the first defendant. The first defendant had breached his duties as executor when he failed to bring in all the deceased's assets. The information in the list of assets in his application for grant of probate was incomplete. The amounts in the assets listed as accounts in HSBC Bank Malaysia Berhad, Standard Chartered Bank (M) Bhd, AmBank (M) Bhd, Affin Nominee and Bank of China were stated as Tidak Pasti. The values remain undetermined to date. In addition, there were several assets which were not listed in the list of assets. The first defendant admitted to this omission in cross-examination.

[45] The plaintiffs led evidence of a journal kept by the deceased of his bank balances and fixed deposits. A copy of his handwritten page was tendered in evidence (B-519 of the Common Bundle of Documents). The complete journal, however, could not be located. A total amount of

RM2,450,000 as at November 2013 was written at the bottom of the page. The first defendant confirmed that some of the accounts mentioned in the said document exists.

[46] The plaintiffs contend that as the first defendant had refused to give an account of the assets of the estate requested, it is uncertain if the first defendant had fulfilled his duties as an executor to ascertain and bring in the assets.

[47] The plaintiffs appear to recognise that the duties of an executor continue for so long as the assets have not been fully ascertained. The list of assets annexed to application for grant of probate by the first defendant is but a provisional one. It is understandable in view of the substantial assets of the deceased. To my mind, the real complaint of the plaintiffs is that the first defendant had refused to give an account of the deceased's assets. They demand to know if the deceased had other assets apart from what was listed. The first defendant's refusal to supply the information, however, cannot be a reason for the plaintiffs to allege he had failed to bring in the assets.

[48] The same allegation is levelled at the first defendant with regard to the liabilities of the estate. The plaintiffs claim that he had not taken any genuine steps to ascertain and settle the debts and liabilities of the estate.

[49] One specific instance of the allegation is the deceased's debt of RM400,000 owed to Kok Toon from the sale of the latter's shares in Poly-ply Industries Sdn Bhd ("Poly-ply"). 80% of the shares in Poly-ply was held by the second defendant, and the balance held by Kok Toon and the third plaintiff, who each held 10% of the shares. Sometime in 2008, the deceased decided to sell the entire shares of Poly-ply and the factory premises owned by the second defendant to Cymao Holding Bhd ("Cymao"). It was alleged that the deceased agreed that both Kok Toon and the third plaintiff were to be paid RM1.2 million and RM800,000 respectively for the sale of their shares. The third plaintiff was fully paid, but not Kok Toon. He was only paid RM800,000. A balance of RM400,000 remained due and owing to Kok Toon.

[50] The plaintiffs claimed that the first defendant was approached several times between 2017 to 2018 for the payment of the balance sum of RM400,000. Each time, he brushed off the matter.

[51] The sale and purchase agreement dated 2 September 2008 (SPA) pertaining to the sale of shares in Poly-ply was adduced in evidence. The vendors were stated as the second defendant, the third plaintiff and Kok Toon. The purchaser was Cymao. The purchase price agreed upon was RM2 million.

[52] Having perused the SPA, I consider it incredulous that Kok Toon was to be paid by the deceased, instead of Cymao, the purchaser. Added to that, a sum of RM1.2 million to be paid for a mere 10% shareholding seems incredulous. This amount, in relation to the sale price of RM2 million and Kok Toon's 10% shareholding is incredibly disproportionate. I find the allegation that an amount of RM400,000 was owed by the deceased from the sale of Kok Toon's shares is, to say the least, implausible.

[53] Apart from the oral assertion of the plaintiffs, I find no other evidence to substantiate the claim that RM400,000 was owing by the deceased to Kok Toon.

[54[In any event, the deceased died some eight years after the sale of Polyply. If it was indeed owed to Kok Toon by the deceased, it would be reasonable to expect Kok Toon to have, in the eight years, requested to be paid the RM400,000. There was no evidence that he did so. The first defendant's alleged failure to settle the liability of RM400,000 is therefore not proven as the debt itself has not been established.

[55] The fourth plaintiff is the executor of Kok Toon's will. The grant of probate was adduced in evidence. The fourth plaintiff admitted in cross-examination that the RM400,000 owed by the deceased was not stated as part of the assets of the estate of Kok Toon.

[56] The failure of the first defendant to ascertain and bring in the assets of the deceased as well as to settle his liabilities has not been convincingly made out.

Failed To Sell The Immovable And Movable Properties In The Deceased's Estate And To Distribute Fairly Amongst Members Of The Hong Family

[57] The alleged failure here pertains to the duties of the first defendant as a trustee under the will. The plaintiffs contend that as a trustee under a trust for sale, the first defendant has a duty to sell the property in the estate and to distribute the proceeds fairly to the beneficiaries.

[58] This contention is premised on the general duties of a trustee under a trust for sale. Several authorities were cited by the plaintiffs in support. I have no quarrel with the principles stated therein. However, it is my view that the application of general principles must take into account the particular facts of each case.

[59] The terms of the will are material. Firstly, the terms expressly provide that the first defendant has the power "to sell the same with power at his absolute discretion to postpone such sale upon trust …". Secondly, the Will also confers on the first defendant absolute discretion in the determining the distribution of the estate property to any beneficiary. This is obvious from

the words "... to distribute to the family member as beneficiary At His Absolute Discretion ..." And to further emphasise the full discretion of the executor and trustee, the testator added, "… and nobody shall ever question his exercise of discretion whatsoever!".

[60] In construing a will, the intention of the testator is paramount and must be given effect to. His intention is to be derived from the wording of the will. (See: *Foo Jee Seng v. Foo Jhee Tuang* [2012] SGCA 41).

[61] The duty of the court is to give effect to the wishes. Defence counsel referred to *Todd & Wilson's Textbook on Trust* (8th edn), where the learned author said:

> Although the ultimate benefit under a trust goes to the beneficiaries the trustees are concerned not only with their wishes, but also with those expressed by the settlor in the creation of the trust. There is therefore no general principle which permits the beneficiaries to control the way in which the trustees exercise their discretion. Were it otherwise, the trustees would be hopelessly handicapped in fulfilling their overriding duty towards the trust as a whole and the court will never compel the trustees to act under orders from the beneficiaries where a power of discretion has been entrusted to the trustees alone.

[62] The above passage was referred to in the judgment of Harmindar Singh Dhaliwal JC (as he then was) in *Panchanath Ratnavale v. Sandra Segara Mahalingam & Ors* [2012] 1 LNS 167; [2012] 5 MLJ 109.

[63] The words employed in the will of the instant case are such that I am left in no doubt that the deceased intended the first defendant to have absolute discretion in the administration of his estate. The plaintiffs have no right to demand for the assets to be sold and the proceeds to be distributed to them. In the face of such clear terms of the will, I doubt if the plaintiffs are even entitled to demand a distributive share of the estate.

[64] The issue of the first defendant's failure to sell the properties and to distribute the proceeds, in my view, does not arise.

[65] Defence counsel drew my attention to the case of *Chia Chiew Neo (Spinster) v. Tan Thian Chye & Anor; In the Matter Of The Will Of Chia Yew Siang (Also Known As Chia Bok Tong), Deceased* [1932] 1 LNS 10; [1932] 1 MLJ 175 in support of his submission that a trustee is not bound to sell even where the beneficiary has a right to the distributive share of the residuary estate. I find the case to be instructive.

[66] The trustees in that case were given the whole of the estate "upon trust to sell, call in and convert into case with full discretionary power to postpone such sale, calling in and conversion and to hold the proceeds on trust" for the beneficiaries. Each beneficiary would have an interest in his or her share

upon attaining the age of 21. The plaintiff turned 21 and demanded her share to be distributed to her immediately before the trustees could sell the trust estate. In dismissing the claim of the plaintiff, Morison CJ held:

> Mr. Tan's second point is that as the trustees have full discretion to postpone a sale and conversion there are no assets upon which the rule in *Saunders v. Vantier* can operate, for where land is demised to trustees upon trust for sale, with power to postpone, even a person who is indefeasibly entitled to a share of the proceeds of sale cannot insist on an immediate exercise of the trust for sale against the discretion of the trustees nor can he call for a conveyance of the land (*Theobald*, 8th edition pages 500-1). This is clearly laid down in *Re Horsmaill* (1909) 1 Ch 631 and in *Re Kipping* (1914) 1 Ch 62. In the latter case Buckley LJ (at page 67) said of the applicant – *"his contention is that the trustees are bound to sell because he has a right to a distributive share of the residuary estate and to be paid that share. He is not, in my opinion, so entitled. The Will gives him, not a distributive share of a sum of money, but a distributive share of the income of the property so long as it remains unsold, and a distributive share of the proceeds of sale when the property is sold. There is no gift of the proceeds of sale until the property is sold, and he is not entitled to interfere with the bona fide exercise by the trustees of their discretion and to call upon them to sell. There is no original gift to him under which he is entitled to have the property sold now".* (emphasis added)

[67] By insisting that the first defendant ought to sell and distribute the assets of the estate, the plaintiffs are saying that because they have a right to a distributive share of the estate, the first defendant is bound to sell the assets. They are completely misconceived in their contention as the discretion to sell and distribute is exclusively that of the first defendant.

[68] Apart from complaining that the property of the estate has not been sold for distribution to the beneficiaries, the plaintiffs are also insisting on a fair distribution of the estate. In her evidence, the first plaintiff candidly said in cross-examination that the beneficiaries must be given equal share.

[69] It is rather unfortunate that the first plaintiff was clearly under a misconception that this was the entitlement of the beneficiaries. There is nothing in the will to support her contention. On the contrary, the Will gave the first defendant absolute discretion to decide who is to get what. It is not for the beneficiaries to dictate how the first defendant is to exercise his discretion.

Distributed The Deceased's Estate To Non-family Members In Breach Of The Instructions Under The Will

[70] The non-family members referred to are Madam Chan and her two sons, Kok Foon and Kok Sung. Although the plaintiffs admit that both these individuals are from Madam Chan's relationship with the deceased, she was never recognised by them as the lawful wife. Instead, they regarded her as the mistress.

[71] It is not in dispute that the first defendant transferred the deceased's half share of the property identified as a double storey terrace house in Kapar, Klang to Madam Chan. This property was co-owned by Madam Chan with the deceased. She has now moved to Australia. Prior to her move, she stayed at the said premises.

[72] The deceased had advanced RM150,000 each to Kok Foon and Kok Sung to enable them to purchase a house in Australia. Like their mother, both now live in Australia. When Kok Foon tendered repayment of RM300,000 in July 2016, the first defendant decided to waive the debt by treating it as a gift instead.

[73] The plaintiffs contend that the action of the first defendant in distributing the estate in favour of non-family members is contrary to the terms of the will. The first defendant is obliged to distribute only to family members, which must mean only legitimate family members. As a mistress, Madam Chan is not.

[74] The plaintiffs' evidence is that Madam Chan was never accepted as the deceased's lawful wife. The first plaintiff testified as to the acrimony that pervaded the household after Madam Chan formed a relationship with the deceased. The hostility towards Madam Chan was evident at the trial, particularly from the testimony of the first plaintiff.

[75] However, the fact that the relationship was less than cordial and the non-acceptance of Madam Chan as the wife of the deceased are irrelevant as to whether Madam Chan is a family member. The question is to be answered from the available facts.

[76] Madam Chan was present at the office of Messrs Azam Malek & Soh during the reading of the will, at the invitation of the first defendant. Both her sons were also present. Her presence was not objected to.

[77] The obituaries of the first and second wives of the deceased were adduced at the trial. The translated version of both obituaries' states Madam Chan as 'isteri muda' of Khee Eng @ Hong Kim Poh. Both counsels however accept that the word 'isteri muda' is a translation of the Mandarin words "Tong Fu Mei", which means sisters of the same husband, by reference to the surviving wives. Both the sons of Madam Chan were also mentioned as the sons of the deceased.

[78] The fact that the deceased had a relationship with Madam Chan and that Kok Foon and Kok Sung were their two sons is not disputed. It is also not disputed that both the deceased and Madam Chan jointly owned the double storey terrace house in the Klang property.

[79] At the trial, the first defendant referred to a letter written by the deceased to third plaintiff. The deceased stated that he made a gift of RM150,000 each to Kok Foon and Kok Sung to enable them to purchase a house in Australia. In the same letter, the deceased referred to both of them as overseas brothers of the third plaintiff.

[80] In my view, Madam Chan and her sons were clearly kith and kin and related to the deceased. I do not think the word family members should be given a legalistic meaning to mean only legitimate family members. There is nothing in the will to indicate so.

[81] I am of the view that the issue of family members is independent of the validity of a marriage. For this reason, I do not consider it necessary to decide if Madam Chan is the lawful wife. The plaintiffs' contention that only legitimate family members can be beneficiaries is to give the words 'family members' a narrow and restrictive meaning. I find the contention without basis.

[82] In the circumstances, the plaintiffs' contention that the first defendant distributed the estate to Madam Chan and her sons in breach of the terms of the will, is without merit.

Wrongfully Transferred 874,000 Shares Of The Deceased In The Second Defendant To Himself And His Three Children

[83] The plaintiffs allege that the shares were transferred before the first defendant had completed his duties as an executor. As an executor, the first defendant is responsible for pre-distribution formalities such as ascertaining and bring in the deceased's assets and settling the estate debts. His duty as a trustee to distribute the assets starts only after the pre-distribution formalities.

[84] The distinction is best explained in *Ligar Fernandez v. Eric Claude Cooke* [2002] 6 CLJ 152; [2002] 5 MLJ 177 by Abdul Hamid Embong J as follows:

> In cases where an executor is also appointed as a trustee, there is a diversity of function as described in the *Law of Trusts in Australia* (5th Ed, 1986) in the following passage:
>
> > The origin of the offices of trustee and executor are quite different, but in modern times, largely as the result of statute, the two offices have a greater similarity than heretofore. An executor, like a trustee, is in a fiduciary relation with the beneficiary and the essential elements of a trust are all present in executorship. However, although there are great similarities between the two offices, it is not possible to identify the position of an executor with that of a trustee. Their respective powers and duties differ in an important respect. The principal duties of an executor are to get

> in the assets of the deceased, to pay his debts, to pay the legacies given by the will, and to distribute the assets. If a testator appoints the same person his executor and his trustee, which is usual nowadays, then that person acts as executor when he performs executorial duties, and thereafter while he continues to hold the property he is a trustee thereof. However, even though he thus becomes a trustee, his capacity as executor still remains, in so far as he may be called upon at any future time to deal in his capacity as executor with any assets which may subsequently be discovered in the estate. He may thus be executor in respect of certain assets of the testator and trustee in respect of others. If the executor, while still performing his executorial duties, carries out an instruction in his testator's will to set aside a fund and to hold it on trust for certain beneficiaries, he will, upon him setting aside that fund, become a trustee thereof and in respect of that property his executorial duties will be at an end.

In the book entitled *Probate and Administration in Singapore and Malaysia: Law and Practice*, the learned author, on the appointment of executors and trustees observed the following:

> 2. Appointment of executors and trustees
>
> A will provides for the disposition of a testator's property. He does so through his representatives named in the will as executors and trustees. Though the same persons may be appointed as executors and trustees, their functions are quite distinct. An executor calls in the estate, converts the assets into cash and distributes the same amongst the beneficiaries if this is what the will directs.
>
> The act of the executor in calling in the estate and attending to all pre-distribution formalities is the act of an executor *per se*. The act of distributing the estate amongst the different beneficiaries is the act of a trustee. These are distinct duties and it is a slender line which divides the duties of an executor from that of a trustee.

[85] The first defendant does not deny that he transferred the deceased's shares in the second defendant, Hong Brothers Corporation Sdn Bhd, to himself and the third to fifth defendants on 26 May 2016, some three months after the grant of probate.

[86] The question is whether his action constitutes a breach of his duties. Bearing in mind the terms of the will which gives the first defendant powers to also "distribute to the family member as beneficiary at his absolute discretion", and the imperative nature of the words following, "… and nobody shall ever question his exercise of discretion whatsoever!" I am of the view that the deceased intended the first defendant to have full control over the estate as he deems fit. In view of this, whilst ordinarily his action in this regard may attract a suggestion of breach of duties, I do not find it to be so in this case.

[87] The plaintiffs also relied on the first defendant's act of mixing his personal funds with the estate funds to allege impropriety on his part. The first defendant opened an estate account after the death of the deceased. However, some of the distribution and payment from the estate were not from the estate account, but from his personal account. The plaintiffs claim that the mixing of funds is evidence of a breach of trust.

[88] Breach of trust connotes misappropriation of property held on trust, implying dishonesty. Mixing of funds does not necessarily constitute breach of trust. He used the funds in his personal account to make payment to the beneficiaries when he ought to have used the funds from the estate account. Whilst I agree that the first defendant demonstrated some lack of diligence on his part ought to have kept the accounts separate, I would regard it as at most, a mistake on his part. I would not hold him to the standard expected of a professional trustee. He merely showed less than prudent behaviour in mixing the funds.

Refused To Give An Account Of The Administration Of The Estate To The Plaintiffs When Requested

[89] Evidence was given of a series of correspondence between the solicitors for the parties in relation to the plaintiffs' request for the first defendant to furnish an account of the administration of the estate. The request was not acceded to. Instead, the no-contest clause was threatened to be enforced.

[90] At the trial, the first defendant explained his refusal. He wanted to avoid the plaintiffs pressuring him to distribute the estate property. Prior to his death, the deceased had informed the first defendant that he had made substantial cash gifts to the plaintiffs. He had also bought property for the family members. He regarded these gifts as part of the distribution of his estate. He did so as he was aware of the potential conflict from the distribution of his estate. Subsequent to the deceased passing, the several conversations first defendant had with the first plaintiff and Kok Toon confirmed that they were only concerned with the distribution of the deceased estate.

[91] I do not doubt his explanation as to his refusal to supply the information requested. His reluctance is understandable. However, notwithstanding his earlier refusal, the first defendant through his counsel, now agrees to concede to the order for accounts.

[92] From the testimony of the plaintiffs I surmise that the plaintiffs are unhappy with the first defendant for not furnishing them an account of the estate as they expect to be distributed more than what they had received. However, the will does not allow them to dictate how the first defendant

exercises his discretion. Nonetheless, as the estate is that of the plaintiffs' late father, and they stand to potentially benefit in the event the first defendant exercises his discretion in their favour. In the premises, I consider an order for accounts to be adequate to assuage their concerns.

[93] The plaintiffs' suit is to ultimately to remove the first defendant as the executor and trustee and to replace him with the first plaintiff, or as the plaintiffs' counsel submitted, any person whom the court considers suitable.

[94] In order to do so, I would have to be persuaded that grounds exist to override the wishes of the deceased as expressed in the will. It seems to me that the deceased intended to leave the administration of the estate entirely to the first defendant as the eldest son of the Hong family. Consequently, there is no reason to interfere with the wishes of the deceased as expressed in the will that the first defendant is to administer the estate according to his absolute discretion.

[95] For the foregoing reasons, I do not find the plaintiffs to have established on a balance of probabilities, sufficient cause to remove the first defendant and to grant the orders sought for in these proceedings.

The No-contest/Forfeiture Clause

[96] I shall now deal with the counterclaim of the defendants. They seek to enforce the no-contest clause. The clause reads, "… Anyone who disputes my trustee's discretion or commence legal action demanding for more share of my estate shall receive only RM1."

[97] The defendants contend that the clause is effective to disinherit the plaintiffs as the present suit is tantamount to a challenge of the first defendant's discretion in administering the assets of the deceased. The plaintiffs on the other hand, contend that their claim is premised on the exercise of his duties and obligations towards the plaintiffs as beneficiaries.

[98] The plaintiffs' contention is untenable and I am not persuaded that this suit is merely to call into question the exercise of the first defendant's duties and obligations under the will. This suit is an indirect challenge to the exercise of his discretion in administering the assets of the deceased. The alleged breach of his duties and obligations are premised precisely on *inter alia*, how he has administered the estate, including the distribution of it. The first plaintiff candidly admitted in cross-examination that ultimately, she wants to be given more from the estate.

[99] Having said that, the next question to consider is whether the no-contest clause can be enforced? In dealing with the issue, I have been assisted by the authorities referred to by the plaintiffs' counsel.

[100] The no-contest clause has also been referred to as the *in terrorem* clause. The *in terrorem* rule provides in essence, that the testator had not really intended to impose the conditions, and that therefore the no-contest condition would only be given effect if the testator demonstrated, by the inclusion of a gift over, that he was indeed in earnest. (See: Peter G Lawson, *The Rule Against "In Terrorem" Conditions: What is it? Where did it come from? Do we really need it?*).

[101] In *Theobald on Wills* (Sweet & Maxwell, Thomson Reuters Seventeenth Edition), the writer said that "Conditions not to dispute a Will annexed to gifts of personally are subject to the *in terrorem* doctrine, so that if there is no gift over the condition is bad."

[102] An illustration of the application of the *in terrorem* rule is seen in *Leong & Anor v. Lim Beng Chye* [1955] AC 648. The will in question provided that the residuary estate was to be divided equally amongst his widows, his sons and a nephew, and that if any of the sons should die before the prescribed date of distribution leaving a widow and female issue, the son's share shall go to such lawful widow and female issue equally, provided the lawful widow shall remain the widow of such deceased son. There was no gift over in the event of that condition not being fulfilled. One of the testator's sons died before the date of distribution of the testator's residuary estate, leaving a widow and a daughter. The widow married again before the date of distribution. The court had to determine to whom the deceased son's share of the residuary estate was payable.

[103] In deciding that the widow was entitled to the deceased son's share in the estate notwithstanding her remarriage, the House of Lords held that the condition that the widow shall not remarry must be treated as merely *in terrorem*. The no contest clause is only effective if the forfeiture clause is supported by a gift over. The House of Lords said that the condition restraining the subsequent marriage of the beneficiary "was ineffective to destroy the gift unless the Will in question contained an explicit gift over of the legacy to another legatee."

[104] In the present case, apart from the threat that anyone challenging the exercise of the trustee's discretion or commences legal proceedings to demand more share shall be entitled to only RM1, the deceased failed to state what was to happen to the amount that had been distributed. In the absence of such express gift over, I am of the view that the no-contest clause is unenforceable.

[105] In the circumstances, the counterclaim of the defendants that the plaintiffs are to return all that had been distributed to them less RM1 must necessarily fail.

Conclusion

[106] Based on the foregoing reasons, the plaintiffs' claim is dismissed. Consequently, all the orders sought for are also dismissed, save for the order to furnish an account of the administration of the estate of the deceased, which the first defendant concedes to. The first defendant is directed to do so within 30 days from this order. The defendants' counterclaim is also dismissed.

[107] As the plaintiffs' claim is the main action, and in view of the dismissal of their claim, I order that cost of RM40,000 be paid to the defendants as costs of these proceedings.